

**IN THE
SUPREME COURT OF MISSOURI**

NO. SC83778

THE STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

**PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI AND
PLANNED PARENTHOOD OF THE ST. LOUIS REGION,**

Appellants/Cross-Respondents.

**Appeal from the Cole County Circuit Court
The Honorable Byron L. Kinder, Judge**

**BRIEF OF MAUREEN DEMPSEY, DIRECTOR,
MISSOURI DEPARTMENT OF HEALTH**

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POINT RELIED ON

There are no allegations of error preserved for review with respect to the authority of the Director to interpret the language of the appropriations to the Missouri Department of Health or the propriety of the Director's contracts with Planned Parenthood.

Farmers' Elec. Co-op., Inc. v. Missouri Dept. of Corrections,

977 S.W.2d 266 (Mo. 1998)

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Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v.

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State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876

(Mo. 1934)

House Bill 10 § 10.705 (1999)

House Bill 1110 § 10.710 (2000)

ARGUMENT

There are no allegations of error preserved for review with respect to the authority of the Director to interpret the language of the appropriations to the Missouri Department of Health or the propriety of the Director's contracts with Planned Parenthood.

I. Introduction and Summary of Argument

The State commenced an action against both Planned Parenthood organizations (Planned Parenthood) challenging their right to receive state family planning funds under House Bills 10 § 10.705 (1999) and 1110 § 10.710 (2000).¹ The Director was originally brought into the case as a necessary party, and thereafter the State sought to enjoin the Director from paying Planned Parenthood for family planning services performed. Prior to trial, the claims against the Director were dismissed by the State. As a result, there was no judgment entered against the Director and no relief granted by the trial court involved the Director. Accordingly, the Director did not seek appeal of the trial court judgment.

The primary issue in this case is whether Planned Parenthood is lawfully eligible to participate as a service provider in the Missouri family planning program given the eligibility restrictions in the appropriation to the MDOH. Planned Parenthood's participation in the family planning program administered by the MDOH is pursuant to contract. Planned

¹The relevant language in both bills is identical. For ease of reference and discussion, citation generally will be to House Bill 10 § 10.705 (1999) (§ 10.705).

Parenthood, as part of its defense, asserted that their compliance with the appropriation language has in part been based on their reliance on the contracts issued by the MDOH. There are no formal allegations or accusations against the Director or the MDOH, nor is any relief requested by the State against the Director or the MDOH.

After the trial judge entered judgment in favor of the State, both the State and Planned Parenthood appealed. In its responsive brief, the State asserts that the Director's contracts issued pursuant to § 10.705 may not have accurately construed the appropriation language. Any such suggestion, explicit or implicit, should be disregarded to the extent any assertions are construed as claims made against the Director or as prayers for relief with respect to the Director's contracts. There are no claims pending against the Director nor is any relief requested with respect to her contracts. Most importantly, the Director is fully authorized to interpret the legislative language of the appropriation bill at issue to the degree necessary to meet her obligations to effectively administer the Department programs under her jurisdiction. In that regard, not only is the construction of the appropriations bill authorized, it is required, reasonable, constitutional, and entitled to significant deference by this Court.

**II. The
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Section 10.705 contains a number of restrictions on the use of funds paid to family planning service providers that participate in the MDOH program administered by the Director. Of particular importance in the case at bar are those restrictions that govern the relationship between family planning provider organizations and their affiliated abortion services provider corporations. In a stated effort to ensure that no public funds inured to the benefit of an abortion services provider affiliate, the General Assembly, by appropriation, prohibited affiliation between organizations that had certain similarities and shared certain activities. The General Assembly placed in the appropriations bill the terms "similar" and "share," the definitions of which were left unexplained in § 10.705. Because the legislature had assigned the contracting function to the Department, it was up to the Director to define those terms,

rather than leave them ambiguous and subject to private interpretation by those seeking or obtaining contracts with the MDOH to provide family planning services.

The State argues that this Court should disregard the Director's definitions, thus eliminating the deference required for such statutory interpretation by state agencies. The words, "similar" and "share" are ambiguous, and dictionary definitions provide too little guidance to enable the Director to contract pursuant to the restrictions in § 10.705.

The MDOH entered into amended contracts with family planning providers for fiscal year 2000 addressing changes made in the language of § 10.705 from the previous year's bill. The contracts for fiscal year 2000 incorporated these changes.

In amending the contracts, the Director did two things: (1) She included the entire text of § 10.705.1 and (2) included definitions of two phrases from the bill that were not defined in the bill but that the Director concluded required definition. The Director defined the term "similar" within the context of corporation names as between the family planning provider and its independent affiliate that provides abortion services, and the term "share" with respect to its use describing the prohibited details of the relationships between such providers. That portion of the bill that includes these terms appears below:

To ensure that the state does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds, an organization that receives these funds and its independent affiliate that provides abortion services may not *share* any of the following:

- (a) The same or *similar* name
- (b) Medical or non-medical facilities, including but not limited to business, offices, treatment, consultation, examination, and waiting rooms;
- (c) Expenses;
- (d) Employee wages or salaries; or
- (e) Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies.

An independent affiliate that provides abortion services must be separately incorporated from any organization that receives these funds.

Section 10.705.1. (Emphasis supplied.)

To prevent the contractors from giving their own varying interpretation to the terms "same or similar name" and "share," left undefined by the legislature, the Director included the following definitions in the contract:

To ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:

The same or similar name under applicable corporation statutes of Missouri or any other state in which the Contractor and affiliate are incorporated;

. . . .

"Share" is defined as services, employees, or equipment that are provided or paid for by the family planning contractor on behalf of the independent affiliate that provides abortion services without payment or financial reimbursement from the independent affiliate who provides abortion services. This will ensure that none of the state family planning funds may go directly or indirectly to the independent affiliate that provides abortion services.

III. The Director is required to interpret the appropriations language for her family planning program contracts. Any suggestion that the Director exceeded her authority or acted contrary to law is false and unsupported by well-established law.

A. A court must give appropriate deference to a state agency's construction of a statute that the agency administers.

It is well established that "the interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. 1972); *see also, Heavy Constructors Ass'n of Greater Kansas*

City Area v. Division of Labor Standards, 993 S.W.2d 569, 571 (Mo.App. W.D. 1999). The burden is upon those challenging the agency's interpretation to show that it bears no reasonable relationship to the legislative objective. *Id.* In other words, the agency's interpretation must be sustained unless it is unreasonable and plainly inconsistent with the underlying statute. *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 303 (Mo.App. W.D. 1997).

In considering the meaning of language in a statute, the intent of the general assembly is to be given effect. *Laws v. Secretary of State*, 895 S.W.2d 43, 46 (Mo.App. W.D. 1995) citing, *A.M.G. v. Missouri Div. of Family Services*, 660 S.W.2d 370, 372 (Mo.App. E.D. 1983). Since Missouri does not record debates on bills or publish committee reports, legislative intent must be found in the words of the statute. *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 601 (Mo. banc 1977). When determining legislative intent, non-technical words and phrases within a statute "are given their plain and ordinary meaning as found in the dictionary." *Laws*, 895 S.W.2d at 46. See also, *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 809 (Mo. banc 1998). If the words used by the legislature are subject to only one meaning, then legislative intent can be easily discerned and there is no need to apply rules of construction. *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 340 (Mo. banc 1991). But, when a word has multiple interpretations, courts employ tools of statutory construction to clarify meaning. *Id.*

B. The terms "similar" and "share" are ambiguous as they are used in § 10.705.

1. "Similar"

The term "same" is unambiguous; "similar" is not. According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, "similar" means "having characteristics in common: very much alike." It is thus something less than "same." But the word does not say how much less. It is plain that such a definition refers to some quantity of commonality, however that quantity is not precisely defined. Determining how many characteristics must be in common before two objects, such as corporate names, are considered "similar" is purely speculative. As illustrated by the definition of "similar," two names may be much alike, but nevertheless not "similar" because they are not "very" much alike. Therefore, "alike" would appear to fall somewhat short of the threshold for "similar." However it is approached, the word "similar" is susceptible to multiple interpretations.

2. "Share"

The word "share" is equally unclear. "Share" is defined by WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY as "to divide and distribute in portions." From its dictionary definition, "share" obviously encompasses events where something identifiable is distributed to another without expectation that it will be returned. However, the definition does not clearly address those circumstances where something is distributed and then fully reimbursed. Failing to account for all possible applications of the term "share" leaves it open to interpretation.

As demonstrated by the ambiguities in the dictionary definitions of "share" and "similar," the need for interpretation by the Director was inevitable since definitions for the terms were omitted from § 10.705. If the legislature had intended to exclude any definition of the term

"share," including the Director's definition, the process simply requires that the legislature include such exclusionary language in the text of the appropriation bill. No exclusions were made. Instead, as admitted by Senator Ehlman during a Senate Administration hearing after § 10.705 was enacted, "[s]hare was not defined . . . there's several definitions of what 'share' could mean, and since we didn't say what it meant, there's several people that might agree, might think are appropriate, and some would disagree with it." (L.F. p. 1355-57). The legislature's exclusion of a definition of so imprecise a word should be presumed to have been a matter left to the discretion of the appropriate member of the executive branch of government to establish its meaning within the context of executing the law. *State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340 (Mo. banc 1926).

C. Rules of statutory constructions must be used to determine legislative intent.

The reasonableness of the Director's definitions are measured by the rules of statutory construction. First, courts presume that the legislature was aware of the existing statutes and judicial declarations of law when enacting statutes pertaining to the same subject and will also presume that the general assembly enacted legislation in accord with the law as declared by the courts." *White v. American Republic Ins. Co.*, 799 S.W.2d 183, 188 (Mo.App. S.D. 1990). Legislative intent can also be found by tracing the historical development of a statute, that includes the previous changes made to the statute and changes in legislative policies. *State ex rel Lebeau v. Kelly*, 697 S.W.2d 312, 314 (Mo.App. E.D. 1985). Moreover, when interpreting a statute, it is always necessary to consider all statutes "involving similar or related subject

matter when such statutes shed light upon [the] meaning of the statute being construed." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Most importantly though is ensuring that a statute is interpreted and applied constitutionally.

1. Statutory terms must be construed to avoid the effect of unconstitutionality.

First and foremost, any interpretation of this language must be harmonized with plainly applicable principles of United States constitutional law. The recent case, *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) dealt directly with the contours of permissible restrictions on the right of association (specifically, corporate "affiliation") where an appropriations bill attempted to exclude family planning providers from participation solely on the basis of their affiliation with an abortion services provider. In *Dempsey*, the State described the underlying rationale of the appropriation bill at issue that attempted to exclude affiliates of abortion providers from receiving family planning funds by concluding that the abortion providing organizations received an indirect "*benefit*" from state family planning funds. *Id.* at 460.

Analyzing the case, the Eighth Circuit makes clear that a grantee organization has the right to engage in protected conduct through affiliates. *Id.* at 463. Further, any regulation that does not allow a grantee organization the right to exercise their constitutional rights through affiliate organizations is unconstitutional. *Id.* However, a law may require that an affiliate be truly independent of the grantee so that there is no "*subsidy*" flowing from the grantee to the affiliate organization:

To remain truly "independent," any affiliate that provides abortion services must **not be directly or indirectly subsidized** by a § 10.715 grantee. This will ensure that State funds are not spent on an activity that Missouri has chosen not to subsidize. *See Regan Taxation With Representation of Washington*, 461 U.S. 540, 544, 103 S.Ct. 1997 (1983). **No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.** *See Rust v. Sullivan*, 500 U.S. 173, 180-81, 111 S.Ct. 1759 (1991) (requiring abortion services to be physically and financially separate from government-funded program); *Regan*, 461 U.S. at 544 n. 6, 103 S.Ct. 1997 (requiring affiliate to be separately incorporated and to not receive any government funds); *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1025 (9th Cir.), *cert. denied*, ____ U.S. ____, 119 S.Ct. 539, 142 L.Ed.2d 448 (1998) (upholding regulations requiring affiliates to be separately incorporated and to remain physically and financially independent).

Id. (Emphasis supplied.)

Here, the Director is confronted with a clearly established constitutional right of family planning providers to affiliate with organizations that perform abortions and abortion related services and the mandate of § 10.705 to ensure that no "benefit" flows to such an organization from state funds. The Director's interpretation of the word "share" permits the right to

"affiliate" to continue to have some tangible meaning while guarding against "benefits" flowing from the state funds themselves. Nowhere does the Director's contract permit state funds to be used to purchase items for the abortion providing affiliate, with or without reimbursement. The restriction is against any flow of funds, *not just funds that come from the state*, to the abortion providing affiliate without reimbursement. Such a definition fully respects the lawful restrictions against state funds flowing through a family planning program to subsidize an abortion providing organization while not reading it so broadly as to render meaningless the benefits of lawful affiliation. The words of a statute susceptible to two or more constructions will require that interpretation that will avoid the effect of unconstitutionality. This is so even though it may be necessary to disregard the more usual meaning of the language employed." *State ex inf. McKittrick v. American Colony Ins. Co.*, 80 S.W.2d 876, 883 (Mo. 1934); *see also, M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 159 (Mo. banc 1997). For the Director to have read the term "benefit" as broadly as possible would have been to interpret the word to have the unconstitutional effect of excluding the permissible affiliation under *Dempsey*.

Additionally, all financial relationships are subject to verification through independent audit. H.B. 10 § 10.705.1 (1999). Though the Eighth Circuit did not set forth specific restrictions like those found in § 10.705, because § 10.705 came on the heels of the preceding case, the Director was required to interpret the undefined term of § 10.705 in the context of the court's directive.

Against this backdrop of well-established rules, the Director had several sources of law and judicial declarations to consider in arriving at a proper and permissible interpretation of this ambiguous language in § 10.705.

2. A statute must be read consistently with other statutes of related subject matter.

In interpreting the meaning of a statute, it is required that the statute be read in conjunction with other statutes of the same or related subject matter. *Farmers' Elec. Co-op., Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, 270 (Mo. 1998). In regard to corporate names, the Director naturally looked to the Missouri corporation statutes for assistance since they provided both a rational and accountable way to operationalize the phrase "same or similar name," and served as a source within Missouri law that indicated legislative intent in regard to the phrase. *See generally White v. American Republic Ins. Co.*, 799 S.W.2d 183, 188 (Mo.App. S.D. 1990).

Although Missouri corporation laws require that names be "distinguishable" as compared to the prohibition of § 10.705 that disqualifies providers with "similar" names--the legislature did not define the term "similar" and must be presumed to have left the determination as to whether names are impermissibly alike to the discretion of the Director. Consequently, even though some may disagree as to whether two names are similar, as Senator Ehlman admitted, the Director's use of the Missouri corporation laws as guidance in the naming of family planning corporations and their affiliates is reasonable and not in conflict with § 10.705. Therefore, the Director's interpretation of the matter of corporate names was

sufficiently reasonable to overcome the "plainly inconsistent" standard set forth in *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193 (Mo. 1972) and *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299 (Mo.App. W.D. 1997).

CONCLUSION

It is the ordinary function of the executive branch of government to interpret, apply and enforce the laws. Whether or not reasonable people would agree on the most appropriate definitions of the terms at issue in this case, the Director's definitions for MDOH contracts are reasonable and consistent with the underlying statute. Therefore, the State's assertions that reliance on Department contracts is somehow unreasonable is without rational basis. To further suggest that the Director's should not have construed the appropriation language in her contracts ignores the well-established and most basic rules of our structure of government. Finally, the State's conclusion that the Director's contracts were somehow unreasonable has not been demonstrated. Moreover, all such arguments made by the State venture beyond the State's own pleadings.

This Court should disregard any challenge offered by the State to the Director's contracts.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief of Maureen Dempsey, Director, Missouri Department of Health complies with the limitations contained in Special Rule 1(b) of this Court in that it contains 3,740 words, excluding the cover, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) The floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) Two true and correct copies of the attached brief of Maureen Dempsey, Director, Missouri Department of Health and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of January 2002 to:

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